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In the Supreme Court of the United States

OCTOBER TERM, 1955

No. ——

FEDERAL TRADE COMMISSION, PETITIONER

v.

NATIONAL LEAD COMPANY, THE SHERWIN-WILLIAMS COMPANY, THE EAGLE-PICHER COMPANY, ANACONDA COPPER MINING COMPANY, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The Solicitor General, on behalf of the Federal Trade Commission, prays that a writ of certiorari issue to review the judgment entered in the above cause by the United States Court of Appeals for the Seventh Circuit on January 5, 1956, which modified an order issued by the Federal Trade Commission and affirmed the order as thus modified.

OPINION BELOW

The opinion of the court of appeals is reported in 227 F. 2d 825, and is printed in the Appendix, *infra*, pp. 18–56.

JURISDICTION

The judgment of the court of appeals (Appendix, *infra*, pp. 57–62) was entered on January 5, 1956. The time for filing a petition for a writ of certiorari was extended by Mr. Justice Minton on March 30, 1956, to April 19, 1956 (Appendix, *infra*, p. 63). The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

In a proceeding under Section 5 of the Federal Trade Commission Act the Commission found that the respondents had agreed to sell lead pigments pursuant to a system of zone delivered prices, with the purpose and effect that, as to all buyers within a particular zone, the price of each respondent exactly matched the price of the other respondents, thereby suppressing competition among them. The Commission concluded that such agreement and concert of action constituted an unfair method of competition prohibited by Section 5. It accordingly entered a cease and desist order against any "planned common course of action", agreement or conspiracy to sell at prices determined pursuant to a zone delivered price system. The order also prohibited each respondent from selling at prices determined in accordance with such price system for the purpose or with the effect of systematically matching the delivered prices of other sellers. This prohibition was imposed in order effectively to terminate respondents' long-con-

tinued concert of action and to dissipate the consequences of the past illegal conduct.

The question presented is whether the Commission acted within its statutory authority in directing the individual respondents to cease and desist from selling lead pigments at prices determined in accordance with a zone delivered price system having the purpose or effect of systematically matching the delivered prices of other sellers.

STATUTE INVOLVED

Section 5 of the Federal Trade Commission Act, 38 Stat. 719, as amended, 15 U. S. C. 45, provides in pertinent part as follows:

> (a) (1) Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are hereby declared unlawful.
>
> * * * * *
>
> (6) The Commission is hereby empowered and directed to prevent persons, partnerships, or corporations, * * * from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce.
>
> (b) Whenever the Commission shall have reason to believe that any such person, partnership, or corporation has been or is using any unfair method of competition * * * it shall issue and serve upon such person, partnership, or corporation a complaint stating its charges in that respect and containing a notice of a hearing * * *. * * * If upon such hear-

> ing the Commission shall be of the opinion that the method of competition or the act or practice in question is prohibited by this Act, it shall make a report in writing in which it shall state its findings as to the facts and shall issue and cause to be served on such person, partnership, or corporation an order requiring such person, partnership, or corporation to cease and desist from using such method of competition or such act or practice. * * *

STATEMENT

This proceeding was instituted in 1944 (R. 3, 26). The amended complaint charged, so far as now material, that respondents had violated Section 5 of the Trade Commission Act by combining and conspiring to restrain and suppress price competition in the sale of lead pigments, and that this was accomplished primarily by dividing the country into geographic zones and charging the same delivered price to all buyers within a particular zone irrespective of the buyer's location (pars. 6, 8; R. 63–4, 67). It was also alleged that each respondent uses this price system "for the purpose and with the effect of enabling the respondents to match exactly their offers to sell lead pigments to any prospective purchaser at any destination, thereby eliminating competition between and among themselves" (par. 10, R. 72).

After an extensive hearing, the Commission made detailed findings of fact (R. 3732–97), and

concluded that respondents' agreements and understandings, and their acts pursuant thereto, violated Section 5 (R. 3797). The Commission's order prohibited respondents from entering into or carrying out any "'planned common course of action", agreement or conspiracy to sell at prices determined pursuant to "a zone delivered price system" or any other system resulting in identical prices at the points of sale (R. 3800). Each respondent was also ordered to cease and desist from (R. 3801)—

> quoting or selling lead pigments at prices calculated or determined in whole or in part pursuant to or in accordance with a zone delivered price system for the purpose or with the effect of systematically matching the delivered price quotations or the delivered prices of other sellers of lead pigments and thereby preventing purchasers from finding any advantage in price in dealing with one or more sellers as against another.

An opinion of the Commission, filed simultaneously with its findings of fact, conclusion and order, explained its reasons for prohibiting individual use of the zone delivered pricing system. The Commission stated that respondents had, during the NRA period, established a uniform zone pricing system and had distributed maps showing the boundaries of the zones to be observed, and that subsequently each respondent had, with minor variations, followed the zone

delivered price system and adhered to the zone boundaries shown on these maps (R. 3813–4). The Commission said that, in this situation, an order directing each respondent to desist from use of a zone delivered price system "is necessary * * * to make the order fully effective against the trade restraining conspiracy in which each of the respondents participated" (R. 3814). The prohibition would, in the opinion of the Commission, "eliminate the effects of" their conspiracy and "guarantee against" its continuation (R. 3815).

The Commission also stated that unless the respondents who control practically the entire national production of lead pigments, are individually deprived of "the device which made their combination effective, an order merely prohibiting the combination may well be a useless gesture", and "the evils springing from the combination, one of which is to eliminate price competition, may well continue indefinitely" (*ibid.*). The Commission pointed out that under the zone pricing system the delivered price is the same for every point within a zone, and that once the price in the par zone has been established and the relative price gradations in the other zones have also been established, "the system operates substantially automatically" (R. 3816). Accordingly, "the momentum of the system, so firmly and maturely established, might last for some time unless effective measures to break it up were

taken"—the purpose of the prohibition running against each respondent individually (*ibid.*). The Commission further said that if competition is later restored and a proper showing is made that the individual prohibition is no longer necessary, "the Commission will, of course, at that time take such action as may be appropriate in the light of the facts and the law" (R. 3817).

The court of appeals upheld the Commission's finding of conspiracy and its order directed against concerted or conspiratorial action, but rejected the paragraph of the order directed against individual use of zone delivered pricing, as beyond the authority of the Commission under Section 5 (b) of the Federal Trade Commission Act. The court pointed out that Section 5 (a) empowers the Commission to prevent a person from using "unfair methods of competition", and that Section 5 (b) provides that if the Commission finds, after a hearing, that the respondent's "method of competition" is prohibited by Section 5, it may issue an order requiring him to cease and desist from using "*such* method of competition" (emphasis supplied). *Infra*, pp. 48–49. The court reasoned that the Commission may exercise only the powers conferred upon it by statute, that its order "must comport precisely with the legislative grant of power", and that "the permissible order is restricted to a prohibition of 'unfair methods of competition' found to exist" (*infra*, p. 49). The court therefore ruled

that the Commission, not having determined that individual use of a zone delivered price system is unlawful, was without authority to prohibit such use.

REASONS FOR GRANTING THE WRIT

If the portion of the order directed against the respondents individually had been rejected upon the ground that it bore no reasonable or persuasive relation to the conduct found illegal, this would have been an exercise of the ordinary reviewing functions of an appellate court. See *National Labor Relations Board* v. *Express Publishing Co.*, 312 U. S. 426, 435–437. A decision so predicated would present no question of law of general importance. But the court of appeals squarely based its decision on its view as to the limited statutory power of the Federal Trade Commission—that Section 5 requires the Commission to confine its prohibitions to conduct found to be unlawful. This interpretation severely limits the Commission's power to prescribe effective remedies against unfair methods of competition. We submit that it is in conflict in principle with numerous decisions of this Court and other courts of appeals, holding that the Commission has wide discretion in fashioning the remedy which it deems necessary, in the particular circumstances involved, to prevent a continuation of conduct constituting a violation of the Federal Trade Commission Act.

The cases on which the court below relied do not support its restrictive interpretation of the

scope of the Commission's remedial powers under Section 5. *Arrow-Hart & Hegeman Co.* v. *Federal Trade Commission*, 291 U. S. 587, and *Federal Trade Commission* v. *Western Meat Co.*, 272 U. S. 554, dealt with the relief which the Commission is authorized to order when it finds a violation of Section 7 of the Clayton Act (15 U. S. C. 18), which (as it then stood) made it unlawful for one corporation to acquire capital stock of another corporation where the acquisition might adversely affect competition. Section 11 of that Act (15 U. S. C. 21) stated the relief which the Commission might grant if it found a violation of Section 7, namely, entry of an order requiring the offender to cease and desist from such violation, "and divest itself of the stock * * * held". In view of this specification, it was held that the only divestiture order which the Commission had authority to issue was an order for divestiture of the stock illegally acquired and held.[1]

The court below also relied on *Salt Producers Ass'n* v. *Federal Trade Commission*, 134 F. 2d 354 (C. A. 7), which held that an order directed

[1] *Federal Trade Commission* v. *Eastman Kodak Co.*, 274 U. S. 619, which the court below cited, held that the Commission is not authorized to order a divestiture of assets in a proceeding under Section 5 of the Trade Commission Act, but the reason stated was that the question "is in effect ruled by" the decisions denying the Commission's power to grant such relief as against a violation of Section 7 of the Clayton Act. 274 U. S. 624.

against zone delivered prices could not be supported upon the basis that this method of pricing is *per se* an unfair method of price competition when the Commission had made no finding to this effect. But the present case presents the quite different issue of whether the Commission, having found that respondents had concertedly established and maintained a non-competitive pricing system, could reasonably conclude that effective termination of this illegal conduct requires a break with the precise pricing pattern which respondents had maintained for a period of some 20 years. And the present order, unlike that in the *Salt Producers* case, is not a blanket condemnation of individual zone delivered prices; they are prohibited only if their purpose and effect is to prevent "purchasers from finding any advantage in price in dealing with one or more sellers as against another" (*supra,* p. 5.).[2]

The narrow view adopted by the court below of the Commission's statutory power in prescribing a remedy adequate to put a stop to a violation of Section 5 of the Trade Commission Act clearly does not accord with the decisions of this Court defining the remedial powers of the Commission in a proceeding under that section. "The Commission has wide discretion in its choice of a

[2] For example, each respondent is free to redraw zones and impose a uniform delivered price within each zone—provided there is no systematic matching of price schedules with those of other respondents.

remedy deemed adequate to cope with the unlawful practices" found in such a proceeding. *Jacob Siegel Co.* v. *Federal Trade Commission,* 327 U. S. 608, 611. "Congress placed the primary responsibility for fashioning such orders upon the Commission, and Congress expected the Commission to exercise a special competence in formulating remedies to deal with problems in the general sphere of competitive practices". *Federal Trade Commission* v. *Ruberoid Co.,* 343 U. S. 470, 473. There is a "special reason" why courts "should not lightly modify the Commission's orders made in efforts to safeguard a competitive economy", because Congress, when it passed the Trade Commission Act, envisioned the Commission as a body "trained to combat monopolistic practices", and to this end provided in Section 7 of the Act that if a court concluded that the Government was entitled to a decree in an antitrust case, it might refer the case to the Commission "as a master in chancery, to ascertain and report an appropriate form of decree." *Federal Trade Commission* v. *Cement Institute,* 333 U. S. 683, 726–727.

In the *Siegel* case, where the issue was the breadth of a Commission order in a Section 5 proceeding, the Court said (pp. 611–612): "Here, as in the case of orders of other administrative agencies under comparable statutes, judicial review is limited. It extends no further than to ascertain whether the Commission made an allowable judgment in its choice of the remedy." The

first four cases cited in an appended note to illustrate the limited judicial review of orders of other administrative agencies "under comparable statutes" involved orders of the National Labor Relations Board. Since its statutory authority respecting cease and desist orders against unfair labor practices precisely parallels the Federal Trade Commission's statutory authority respecting unfair methods of competition,[3] it is significant that this Court has declared that the Board "has the same power to determine the needed scope of cease and desist orders under the National Labor Relations Act that courts have, when authorized to issue injunctions, in other litigation." *May Stores Co.* v. *National Labor Relations Board,* 326 U. S. 376, 391–392.

In *May Stores* the Court observed that courts of equity grant injunctions "in broad terms" when this is deemed "essential to accomplish the purposes" of the statute being enforced, 326 U. S. 391. The Court quoted in an accompanying note portions of the opinions in two Sherman Act

[3] Section 10 (c) of the National Labor Relations Act, as amended, 61 Stat. 147, 29 U. S. C. 160 (c), provides that if the Board shall find that a person has engaged in an unfair labor practice, it shall issue an order requiring such person to cease and desist from "such unfair labor practice". There is the further provision that the order require such person "to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act", but the "effectuate" clause clearly applies only to affirmative action required by a Board order.

cases, including the statement in *Local 167* v. *United States,* 291 U. S. 293, 299, that the decree "should be broad enough to prevent evasion" (*ibid.*). In other opinions dealing with the relief appropriate in antitrust cases this Court has said that the decree should be framed "so as to suppress the unlawful practices and to take such reasonable measures as would preclude their revival" (*Ethyl Gasoline Corp.* v. *United States,* 309 U. S. 436, 461); that it may "prohibit acts which in another setting would be unobjectionable" (*Hartford-Empire Co.* v. *United States,* 323 U. S. 386, 409); that it should, "so far as practicable, cure the ill effects of the illegal conduct, and assure the public freedom from its continuance" (*United States* v. *U. S. Gypsum Co.,* 340 U. S. 76, 88). See also *International Salt Co.* v. *United States,* 332 U. S. 392, 401.

This Court has held that the National Labor Relations Board, in determining relief, may give weight to considerations of the foregoing kind. In *International Assn. of Machinists* v. *N. L. R. B.,* 311 U. S. 72, the first case cited in the note in the *Siegel* case previously mentioned (*supra,* p. 12), the Board found that the employer had "assisted" a craft union when it and an industrial union were engaged in rival organizing campaigns. Because of this unfair labor practice by the employer, the Board ordered him to bargain exclusively with the industrial union although,

before the order issued, the craft union had notified the Board that it then represented an overwhelming majority of the employees. This Court held that the Board properly acted without investigating this claim or ordering an election. It said that the Board "has the power to take appropriate steps to the end that the effect of those [unfair labor] practices will be dissipated"; that it is for the Board, not the courts, "to determine how the effect of prior unfair labor practices may be expunged"; and that the Board might justifiably conclude that "unless the effect of the unfair labor practices is completely dissipated, the employees might * * * not have the complete freedom of choice which the Act contemplates." 311 U. S. 82.

The decision below in the instant case that the Commission is without statutory authority to prohibit acts not found illegal squarely conflicts, we submit, with the decision of this Court in *Federal Trade Commission* v. *Ruberoid Co.*, 343 U. S. 470. There the Commission found that the respondent had granted discounts of 5% or more and that these discounts constituted a price discrimination prohibited by Section 2 of the Clayton Act. Although no finding was made that a discount of less than 5% violated the section, the Commission's order prohibited sale at any discount whatever. This Court upheld the order. It reaffirmed its ruling in the *Siegel* case that "the courts will not interfere except where the remedy selected has no

reasonable relation to the unlawful practices found to exist", and it held that "the Commission was not required to limit its prohibition to the specific differential" found to be a violation of the statute. 343 U. S. 473–474. The Court said further (p. 474): "In the absence of any indication that a lesser discrimination might not affect competition there was no need to afford an escape clause through which the seller might frustrate the whole purpose of the proceedings and the order by limiting future discrimination to something less than 5%."

We emphasize that the test applied in the *Siegel* and *Ruberoid* cases, "reasonable relation to the unlawful practices found to exist", necessarily means that the Commission's order may embrace conduct *other than* "the unlawful practices found to exist".

The provision of the Commission's order which is here in issue was designed both to prevent evasion of the prohibition against concerted action and to dissipate the effects of respondents' past illegal conduct (*supra,* pp. 6–7). Under the decisions, the Commission was entitled to frame its order so as to achieve these objectives, and the means adopted for achieving them plainly are within the ambit of an "allowable judgment".

While we have discussed and relied primarily on decisions of this Court, it is noteworthy that courts of appeals have given similar wide berth to the scope of conduct which the Commission

may permissibly prohibit in orders directed against violation of Section 5 of the Trade Commission Act. *Consumer Sales Corp.* v. *Federal Trade Commission,* 198 F. 2d 404, 408 (C. A. 2), certiorari denied, 344 U. S. 912; *Independent Directory Corp.* v. *Federal Trade Commission,* 188 F. 2d 468 (C. A. 2); *Hershey Chocolate Corp.* v. *Federal Trade Commission,* 121 F. 2d 968 (C. A. 3).

The court below did not reach the question of whether the Commission's qualified prohibition of individual use of a zone delivered pricing system should have a specific time limitation, in lieu of subjecting respondents to this prohibition until such time as they demonstrate that price competition has been restored. On the contrary, the court struck the prohibition in its entirety, as beyond the Commission's statutory power. The court's *ratio decidendi* is of general application and, if followed by other courts, will severely circumscribe the Commission's power to provide effective relief against violations of the statutes which it administers.

CONCLUSION

The decision below is in conflict with applicable decisions of this Court and other courts of appeals, and it presents a question of law of general importance in the administration of the Federal Trade Commission Act and certain sections of the Clayton Act. It is respectfully submitted that the petition for a writ of certiorari should be granted.

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APRIL 1956.

APPENDIX A

Opinion of the United States Court of Appeals for the Seventh Circuit

Decided December 1, 1955

Before LINDLEY, SWAIM and SCHNACKENBERG, *Circuit Judges.*

LINDLEY, *Circuit Judge.* Petitioners seek to set aside a cease and desist order entered by the Federal Trade Commission on an amended complaint charging them and the Glidden Company with violation of Section 5 of the Trade Commission Act, 15 U. S. C. § 45 (a), and Section 2 (a) of the Clayton Act, as amended by the Robinson-Patman Price Discrimination Act, 15 U. S. C. § 13. Count I of the complaint, filed April 12, 1946, charged that petitioner, National Lead Company, had violated and was violating "Section 5 * * * by monopolizing, attempting to monopolize and acting to control the sale of lead pigments and the prices thereof in commerce", and that all named parties were violating the Act by combining and conspiring "among themselves and with each other" for the purpose and with the effect of eliminating competition in prices and terms of sale of lead pigments in commerce. Count II charged all parties with discrimination in prices by means of various zone pricing methods and quantity and functional discounts.

Various attacks are made upon the validity of the order, or portions thereof, addressed to the alleged insufficiency of the evidence to support

the findings and to the scope of the order. Some of the questions posed apply only to a single petitioner, while others are applicable to all.

I. Propriety of the Order Against Anaconda Copper

We shall first dispose of the contention of petitioner Anaconda Copper Mining Company that the order cannot stand as to it, based on its assertion that it has never engaged in the industry as a producer, distributor or otherwise. In 1919, Anaconda Lead Products Company, a wholly owned subsidiary of Anaconda Copper, began production of lead pigments. International Smelting & Refining Company, another wholly owned subsidiary, acquired all the assets of Anaconda Lead in 1936 and thereafter, until 1946, engaged in production of certain lead pigments which were sold by it and by Anaconda Sales Company, a third subsidiary of Anaconda Copper. International was a respondent in the proceeding and is one of the petitioners here. Anaconda Lead (dissolved in 1936) and Anaconda Sales are not parties.

At the conclusion of the evidence in support of the complaint, Anaconda moved to dismiss as to it, urging that the evidence failed to show that it had ever engaged in manufacture or sale of the products. The Commission denied the motion, holding that Anaconda had been engaged in the pigments field "through its wholly owned subsidiaries." The Commission found that International and Anaconda Lead "were in fact mere operating divisions of respondent Anaconda, with no substantial separate identity of

their own", and that all their acts and those of Anaconda Sales were those of Anaconda. On this basis, the cease and desist order was directed against Anaconda Copper.

We have searched in vain for evidence of a substantial character to support the findings on this phase of the case. Though the record shows that International, Anaconda Lead and Anaconda Sales are wholly owned subsidiaries of petitioner and in September 1947, at a date after International had withdrawn from the field, Anaconda, Anaconda Sales and International were controlled by interlocking boards of directors and officers, there is no evidence which militates against the existence and activity of these subsidiaries as separate entities at any time pertinent to this inquiry. Thus, though the evidence tends to prove the incidents of a parent-subsidiary relationship, a fact which has never been in dispute, the closely correlated operation of International and Anaconda Sales reflects no sinister connotation of domination by their common parent, keeping in mind that the only function for which Anaconda Sales was organized was to sell products produced by International in certain western states in which the latter was not licensed to do business.

These sparse gleanings from the record fail to support the Commission's finding of substantial identity. To come within the applicable rule, there must be evidence of such complete control of the subsidiary by the parent as to render the former a mere tool of the latter, and to compel the conclusion that the corporate identity of the subsidiary is a mere fiction. *Press Co.* v. *N. L.*

R. B., 118 F. 2d 937, at 946–947, cert. denied 313 U. S. 595 (CA–DC); *Owl Fumigating Corp.* v. *California Cyanide Co., Inc.*, 30 F. 2d 812 (CA–3). Such a finding has no substantial support in this record. The complaint should have been dismissed as to this petitioner.

II. The Conspiracy Findings.

The principal question raised by the remaining petitioners is whether the Commission's findings that the parties conspired to fix and control the prices and bases for sale of lead pigments is supported by substantial evidence. The parties are National Lead Company, Eagle-Picher Lead Company, together with its affiliate Eagle-Picher Sales Company, The Sherwin-Williams Company and International Smelting & Refining Company. The Glidden Company, though not a petitioner, was also charged as a co-conspirator. All are engaged in the production, sale and distribution of lead pigments. National is the leader and produces some 50% or more of the domestic production. Its nearest competitor, Eagle-Picher, accounts for a substantial part of the remaining 50%, while each of the other companies occupies a relatively minor position in the industry.

The three principal products included in the lead pigments category are dry white lead, white lead-in-oil[1] and the lead oxides, red lead and

[1] This term, when used herein, includes all the so-called keg products, red lead-in-oil, etc. The keg products are used principally as pigments for paints, and marketing practices for these products are the same as those employed in marketing white lead-in-oil.

litharge. White lead is used principally as a base in paints and its chief market lies in the demands of manufacturers of mixed paints. White lead-in-oil is a semimixed paint consumed principally by the individual painter or painting contractor who prefers to mix his own paints. The oxides are used mostly by the battery industry as the basic constituent in the manufacture of plates.

Throughout the record, a clear distinction is drawn between the several parties' respective actions in sales of each of the three kinds of pigments. Although the evidence as to practices in each of these fields differs, there are, nevertheless, certain threads of similarity in the methods employed by the various petitioners which render it practical to treat the conspiracy question as a unit, pointing out, wherever necessary, the applicability or inapplicability of a particular evidentiary segment to one or more of the several petitioners. Each engages in the production of white leads and oxides, except that International confines its activities to white leads and has never produced oxides.[2] Unless otherwise noted, all facts narrated and all statements pertinent thereto apply to all petitioners alike, except that factual statements and discussion which relate solely to the oxides apply to all petitioners except International.

The facts as found by the Commission follow. Prior to 1933 no standard pricing system was employed in the industry. Each producer established its own practices as to prices and con-

[2] International withdrew from the pigments field entirely in 1946. Its contentions based on this fact are subsequently considered herein.

ditions of sale. For the most part, with respect to delivered sales prices, each employed its own system of pricing, based on shipping differentials from centrally located warehousing points. For example, National's lists from 1920, until 1933, include some 589 different cities in 40 states, which it, from time to time, used as free delivery or equalization points. The practices of other petitioners differed quite widely.

In 1933, however, each petitioner participated in discussions looking to the adoption of a code of fair competition under the provisions of the National Industrial Recovery Act. These discussions occurred in two committees set up by the Lead Industries Association, one to draft a code for white lead-in-oil marketing and the other a code for the dry pigments, including dry white lead. Discussion within each group dealt with a wide range of subjects relating to prices, freight, quantity and quality differentials and terms and conditions of sales. Tentative agreements, at least, were reached as to terms of the proposed code, including an agreement to sell pigments only on a delivered price basis.

With respect to white lead-in-oil, prices were to be based on a system of par and premium zones, sales were to be made by agency or consignment methods of merchandising, and premium differentials in steps amounting to ¼ cent per pound on an ascending scale were to be added on sales in 50, 25 and 12½ pound containers over the price based on the norm of a 100-pound container. For dry white lead, a zone system of pricing was approved, as was a ¼ cent per pound premium to be added to less-than-carload ship-

ments of less than 20 tons. In effect, the committee agreed not to adopt uniform conditions for sales, on advice of counsel that to do so might amount to a violation of the antitrust laws. Instead, an alternative course was suggested, namely, that one or more of the parties put into effect the uniform terms under discussion, which the others might follow. Agreements in the group considering oxide sales dealt with separate zone systems for carload and L. C. L. sales, including a standard price for carload sales pegged on the cost of pig lead as shown by daily quotations of the American Smelting & Refining Company[3] a price for L. C. L. sales based on a premium differential over the carload price and a premium differential to be added to the price of red lead containing a Pb_3O_4 content of 95% or higher.

Certain of these provisions were included in the code, while others apparently never reached that stage. The code, though adopted, never became operative, however, inasmuch as petitioners, immediately upon its adoption, sought and obtained exemption from its terms.

The Commission found that petitioners, during the NRA discussions, agreed to "cooperatively revise the pricing practices" in the industry in such a manner as to constitute a violation of the Trade Commission Act, and effectuated that agreement by adopting uniform methods of pricing and sales throughout the United States. Practices found to have been put in effect pursuant to that plan in the sale of white lead-in-oil fol-

[3] This Company will be referred to as AS&R hereafter.

low. Beginning in early 1934, petitioners began pricing the product on a uniform, delivered card price basis in a par zone enclosing all the area bounded roughly by the western borders of the States of Wisconsin and Illinois and by the southern boundaries of the States of Kentucky, West Virginia, Maryland and Delaware, but including the City of Saint Louis, Missouri, and the San Francisco area of California. The remainder of the nation was divided into some 7 premium zones in which premiums ranging from 12½ cents to $1.00 per cwt. were added to the par zone selling price. About the same time, petitioners, except Sherwin-Williams, adopted a consignment method of selling, under which stocks were consigned to dealers to be sold at the standard card price, plus premiums, if any, on a commission basis. Thirdly, a quantity differential was imposed upon sales in container sizes less than 100 pounds as follows: ¼ cent per pound on 50 pound, ½ cent per pound on 25 pound and ¾ cent per pound on 12½ pound containers. One variation was noted by the Commission, viz., International, Sherwin-Williams and Glidden systematically fixed their card prices to dealers for white lead-in-oil, at about 25 cents per cwt. below that fixed for National's "Dutch Boy" and Eagle-Picher's "Eagle" brands. It found, however, that the product of all petitioners was offered to the public at identical prices, and that the 25 cent reduction of these companies in dealers' prices was a device intended to encourage dealer incentive to promote sales of the products in competition with the widely known and accepted "Dutch Boy" and "Eagle" brands.

The following practices were found to have been adopted with respect to sales of dry white lead. All sales were made at a standard delivered price basis in a par zone, which included all states east of the eastern borders of Montana, Wyoming, Colorado and New Mexico. A premium of 25 cents per cwt. was added on all sales in states west of this boundary. Uniformly, a premium differential of 25 cents per cwt. was added to the price on L. C. L. sales of less than 20 tons.

With respect to oxides sales, the Commission found that petitioners, in 1934, adopted a uniform zone pricing system, with separate zone prices for carload and L. C. L. sales. For purposes of the former, the United States was divided into two par zones and a single premium zone, while, for the latter, a single par zone and three premium zones were established. Prices were fixed on the basis of differentials of $1.50 and $2.50 per cwt. over AS&R's quotation for pig lead, geared to fluctuate up or down with fluctuations of 25 cents or more. This was the standard price for carload sales. A premium of 40 cents per cwt. was added to L. C. L. sales of five tons or more and of 90 cents per cwt. over the carload charges for sales of less than five tons. Uniform premium prices of 25 and 50 cents per cwt., based on lead content, were established for red lead containing a Pb_3O_4 content of 95% and above. As to sales of all dry products, including dry white lead, the Commission found that petitioners adopted terms of sale of 1% cash in 10 days, net 30 days or 2% cash in 10 days, net 30 days, and that at any given

time the terms as quoted by all petitioners were identical.

With the exception of Sherwin-Williams, petitioners do not dispute the finding that they employed uniform zone pricing systems. In this respect they question only the sufficiency of the evidence to support the findings that petitioners adopted the zone systems pursuant to agreement and that all adopted it at or about the same time. The most that can be said of these contentions is that in some respects the evidence is conflicting. It includes the testimony of petitioners' officers, price cards, invoices and other exhibits on which the Commission could well find that all petitioners adopted the zone system of pricing shortly following the NRA discussions. The Commission has resolved the conflict in the evidence adversely to petitioners and it is beyond our province to substitute our judgment in that respect.

The argument of Sherwin-Williams that it did not employ the zone system of pricing must also fail. That company employs, for example, an elaborate list of cities throughout the area in which it does business showing many of them as equalization, or par, points, and others as localities warranting, as they say, premium prices ranging from 12½ to 75 cents per cwt. on sales of white lead-in-oil. Comparison of this list with the zone maps employed by the other petitioners reveals that the par and premium city listings conform precisely in physical location and scale of premium charges with the established zone system of other petitioners. In view of this evidence, we cannot say that the finding that this

petitioner participated in and used the uniform zone system lacks substantial support.

The most serious attack lodged against the conspiracy findings is that there is no substantial support for a finding of existence of an agreement among the parties to adopt uniform prices and terms of sale. The corollary of that position, viz., that the striking similarity between prices, practices and the conditions of sale fixed by each petitioner is merely the effect of conscious parallelism on the part of the petitioners in the sale of products of standard quality and constituent content, is likewise advanced. Although submitted as separate questions, we think the two issues so inextricably related as to require that they be treated together.

Although there is no direct evidence as to formal agreement on the part of petitioners to adopt the zone system and uniform pricing practices, the finding does not necessarily fall. A conspiracy may be proved by circumstantial evidence. *Triangle Conduit & Cable Co.* v. *FTC,* 168 F. 2d 175, aff'd. sub. nom *Clayton Mark & Co.* v. *FTC,* 336 U. S. 956 (CA–7); *Allied Paper Mills* v. *FTC,* 168 F. 2d 600, cert. denied 336 U. S. 918 (CA–7). As we observed in *Fort Howard Paper Co.* v. *FTC,* 156 F. 2d 899, at page 906 (cert. denied 329 U. S. 795):

> Very pertinently it was pointed out in the *Malsters* case [*United States Malsters Ass'n* v. *FTC* (CA–7)], 152 F. 2d at pages 162 and 164: "As might be expected, there is little, if any, direct proof of an express agreement. Such proof, however, is not necessary. The agreement may be inferred

> from the acts and conduct of the parties as well as circumstances pertinent thereto."

And, in *Milk & Ice Cream Can Institute* v. *FTC*, 152 F. 2d 478, we said at page 480:

> In determining whether such finding [of an agreement to fix prices] is supported, it is not necessary, as argued, that there be direct proof of agreement. Such agreement may be shown by circumstantial evidence, and the Commission, the same as any other fact finding body, is entitled to draw any reasonable inference from the circumstances of the situation.

There is before us evidence that petitioners met in 1933 and 1934 in the committees of the Lead Industries Association and discussed and appraised all elements of pricing and sales practices affecting the industry. The minutes of those meetings and the correspondence between the parties, or between certain of them and officers of the committees, support the conclusion that there were wide areas of tentative agreement upon revisions of such practices. As previously stated, some of these tentative agreements were included in the code adopted in May of 1934. We have found that the evidence sustains the finding that all petitioners did, in fact, adopt the zone system of pricing in May 1934 or shortly thereafter. Price cards and other exhibits tend to show that zoning, and other aspects of uniform pricing, were uniformly adopted practically simultaneously by all petitioners and that changes in certain details from time to time have been put into effect by all petitioners practically simultaneously. The inference of agreement, if

not necessarily impelled by this evidence, is certainly a reasonable one which the Commission as the trier of fact was entitled to draw therefrom. *Milk & Ice Cream Can Institute* v. *FTC, supra* at 480; *Fort Howard Paper Co.* v. *FTC, supra* at 906–7; *Allied Paper Mills* v. *FTC, supra* at 607. Our language in the latter case at page 607 is pertinent, to-wit:

> We cannot say that the Commission's inferences are unreasonable. The petitioners did with varying uniformity use the zoning system of price quoting, and the existence of this plan which equalizes delivered prices of competitors having widely different costs at a given destination, is strong evidence in itself of an agreement to use such plan. * * * Moreover, a uniform participation by competitors in a particular system of doing business, where each is aware of the others' acts and where the effect is to restrain commerce, is sufficient to establish an unlawful conspiracy. *William Goldman Theatres, Inc.* v. *Loew's, Inc.*, 3 Cir., 150 F. 2d 738, 745.

It is unimportant, we think, that this record does not disclose a closely knit operation by petitioners under a central information gathering and disseminating body as was the fact in such cases as *FTC* v. *Cement Institute*, 333 U. S. 683; *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, and the *Milk Can Institute* case, *supra*. The absence of this aspect of many price fixing agreements may indicate nothing more than that the very small number of competitors involved in the field rendered needless such a watch-dog agency. Petitioners to refute the finding of conspiracy,

rely, also, on evidence of sales prices which varied from the card prices. This, it seems to us, is merely an invitation to weigh the evidence and re-determine the facts. However, assuming *arguendo* that the question is properly ours to decide, it is clear that such off-card sales as the record discloses represent only a minute percentage of the hundreds of sales reflected in invoices included in the record. And, in the oxides field, such sales represent substantially uniform price concessions to large battery manufacturers to discourage them from producing their own supplies of oxides. Furthermore, it is clear that a finding of unbending price uniformity is not a requisite of a finding of conspiracy to control prices, but that any device which has the purpose and effect of fixing prices to consumers is an illegal restraint of trade. *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 222–3, and "it is not important that the prices fixed were not fixed in the sense that they were uniform and inflexible." *Allied Paper Mills* v. *FTC*, 168 F. 2d 600, 607 (CA–7). The same principle applies to evidence that petitioners' bids on government contracts frequently were not uniform. We cannot say that the inference of agreement cannot stand in the face of such evidence.

What has been said with reference to agreement disposes in part of the conscious parallelism argument. Petitioners contend that National is the price leader in the field and that the other petitioners merely meet its prices in order to stay in business. While parallel business behavior among competitors is not illegal *per se*, *Theatre Enterprises, Inc.* v. *Paramount Film*

Distributing Corp., 346 U. S. 537, 541, we do not believe the protective mantle of "conscious parallelism" can clothe with immunity a system employed by substantially all members of an industry whereby all offer their products for sale at any given time and at any given point throughout the nation at identical prices, without regard to differences in shipping costs. See *Allied Paper Mills* case, *supra* at 607; *Fort Howard* case, *supra* at 907; *Milk Institute* case, *supra* at 483. This pricing structure seems so arbitrary and artificial as to negative an inference of innocent parallel behavior and to require an inference of at least tacit prearrangement, in view of the record disclosures that all petitioners participated in discussions at which they explored the advantages of the very pricing practices which shortly later they uniformly adopted. *American Tobacco Co.* v. *United States*, 328 U. S. 781, 809; *Interstate Circuit, Inc.* v. *United States*, 306 U. S. 208, 226–227; *Allied Paper Mills* v. *FTC*, *supra* at 607–8.

Closely related to the parallel behavior argument is Eagle-Picher's assertion that, although it systematically matched National's pricing and sales practices, it nevertheless competed vigorously with the latter by supplying its customers with technical assistance and other additional services. In view of our conclusion that the finding of an agreement is justified, it is a sufficient answer to this argument to reaffirm the well settled postulate that it is unlawful for competitors, by agreement, to block off any of the normal channels of competition with the purpose of establishing identical prices for products of like grade,

even though other facets of normal competition may remain unfettered. *FTC* v. *Cement Institute, supra; United States* v. *Socony-Vacuum Oil Co., supra.* This principle rests on the view that the purchasing public is entitled to an opportunity to bargain with competing firms with regard to purchase prices of products of like quality.

III. PRICE DISCRIMINATION.

Under Count II of the complaint, the Commission found that petitioners and Glidden were guilty of price discrimination in the sale of lead pigments in violation of Section 2 (a) of the Clayton Act, as amended, by the Robinson-Patman Act, 15 U. S. C. § 13. Specifically, it found that the zone and quantity differentials were unlawful, except that the carload discount on dry white lead was justified by cost factors on shipments made by rail.

The principal attack on these findings is that there is no substantial evidence of a probability that such price differentials would have an adverse effect on competition between petitioners' various customers. Petitioners argue that the zone boundaries for each type of pigment follow natural trade barriers, that the evidence does not support the finding that competition in fact existed between dealers in the several zones and that the zone and quantity differentials are so insignificant as to negate any effect on competition between purchasers of petitioners' products.

In view of the zealous contention, bordering on an argument that the Commission must prove concretely that petitioners' price differentials have had an unlawful effect on competition, it is well

to refer to the test by which such findings must be measured. Evidence of a probability that discrimination in price between competing purchasers will have the effect of injuring competition is sufficient to sustain a finding of a § 2 (a) violation. As the Supreme Court said, in *Corn Products Refining Co.* v. *FTC*, 324 U. S. 726, 738, the statute "does not require a finding that the discriminations in price have in fact had an adverse effect on competition. The statute is designed to reach such discriminations 'in their incipiency' before the harm to competition is effected. * * * Cf. *Standard Fashion Co.* v. *Magrane-Houston Co.*, 258 U. S. 346, 356–357. But, as we held in the *Standard Fashion* case, *supra*, with respect to the like provisions of § 3 of the Clayton Act, prohibiting tying clause agreements, the effect of which 'may be to substantially lessen competition' the use of the word 'may' was not to prohibit discriminations having 'the mere possibility' of those consequences; but to reach those which would probably have the defined effect on competition." And in *FTC* v. *Morton Salt Co.*, 334 U. S. 37, 47, the Court again defined the test in these words: "the Commission is authorized by the Act to bar discriminatory prices upon the 'reasonable possibility' that different prices for like goods to competing purchasers may have the defined effect on competition." Cf. *Corn Products Co.* v. *FTC*, *supra* at 742. When the evidence of record is considered in the light of this test of a reasonable possibility of injury to competition, we must conclude that *most* of the Commission's findings of § 2 (a) violations are substantially supported.

With respect to white lead-in-oil sales, the Commission found that petitioners discriminated in price in favor of certain dealers by selling their products at a single price within a par zone and at premiums above such price ranging from 12½ cents to $1.00 per cwt. to dealers located outside the zone. It found that these differentials constituted illegal discriminations which tended to injure competition between competing dealers located near the boundaries of adjoining zones.

Petitioners urge that the zone boundaries follow natural trade barriers, and that there is no evidence that dealers do, in fact, compete across these zonal boundaries, inasmuch as the product is marketed by them only locally, as a semi-mixed paint, to individual painters.

The evidence does tend to indicate, however, that competition is keen between dealers in paint products including white lead-in-oil. Furthermore, the evidence tends to show also that there is more than a reasonable possibility that competition would be likely to cross the arbitrary zonal walls which petitioners have erected. We need only refer to one phase of the proof in this respect, namely, that these zonal boundaries dissect 10 states, in some instances placing a single city or metropolitan area in a preferred zone status over the remainder of the state in which it is located. Illinois, Wisconsin and Kentucky are largely in a par zone, but substantial areas in the western part of each are in the 12½ cent premium zone, while the city of Saint Louis is segregated from the remainder of the State of Missouri in a par as contrasted to a

12½ cent status respectively. The cities of San Francisco, Oakland and Berkeley are par territory, while the remainder of California is in a 25 cent zone. The area immediately encompassing the cities of Omaha and Lincoln, Nebraska, and the cities of Atchison, Leavenworth and Kansas City, Kansas, are in the 12½ cent zone as contrasted to a 25 cent status for the remaining area of their respective states. The States of Oregon and Washington are divided roughly equally between the 25 and 50 cent zones. Finally, a zonal boundary approximating the location of the Appalachian barrier separates the 25 cent zone of western Virginia from the 12½ cent status of the eastern portion of the State.

With the possible exception of the last mentioned state, the record impels us to conclude that the barriers which dictated the location of the zonal boundaries were those due to the location of plants of one or more of petitioners and to possibly other considerations known only to the trade. The inference that this division probably would have the deleterious effect on competition which § 2 (a) proscribes is certainly a reasonable one which the Commission as the trier of the facts was entitled to draw from the evidence before it.

With respect to dry white lead sales, the Commission found that petitioners had discriminated in price by offering their product for sale to all customers within a par zone at a price 25 cents per cwt. below that offered to dealers outside the zone. It found also that the 25 cent carload-L. C. L. differential constituted an illegal discrimination against small purchasers, where delivery

was made by local carriers, but found that this differential was a justified cost factor on shipments made by rail. Petitioners challenge each of the adverse findings.

We fail to find in the record any evidence supporting the finding of competitive injury resulting from the zone differential. Petitioners employ two zones in marketing this product, a par zone including all states east of the eastern borders of Montana, Wyoming, Colorado and New Mexico. The states west of this line are in the 25 cent per cwt. premium zone. While there is substantial evidence of a highly competitive relationship between mixed paint manufacturers, the principal consumers of dry white lead, there is no evidence that competition does in fact exist between those in the eastern par zone and those in the Rocky Mountain-Pacific Coast premium zone. To this extent the Commission's order is without basis in fact.

But there is no merit to petitioners' contentions relative to the quantity differential. The evidence tends to indicate, and the Commission found, that a large proportion of mixed paint manufacturing is centralized in and around Chicago, Saint Louis and other metropolitan districts; that one or more of petitioners operate white lead plants in each of these areas; that shipments to such manufacturers are generally by local cartage, and, finally, that the 25 cent per cwt. premium for L. C. L. shipments bears no reasonable relationship to added costs incurred in such shipments. The reasonable probability of injury to competition is certainly a justifiable inference which the Commission was entitled to draw from this showing.

With respect to lead oxides, the Commission found that petitioners, except International, discriminated in price in favor of certain customers as follows: by selling carload lots to all customers in a par zone at a uniform delivered price 25, 50 or 75 cents per cwt. below that accorded to purchasers in each of three premium zones; by a uniform base price of $1.50 for litharge and $2.50 for red lead over AS&R's New York quotation for pig lead and adding the applicable zone differential thereto; and by charging different prices for oxides in carload and L. C. L. purchases, by adding to the carload price 40 cents per cwt. for L. C. L. purchases of more than 5 tons and 90 cents per cwt. on those of less than 5 tons. The Commission found further that the oxides are used principally by the storage battery industry, which is composed of some 200 manufacturers ranging in size from relatively small operators to industrial giants; that this is a highly competitive industry in which the little manufacturer competes not only against Exide, Willard and other large producers, but also against Sears Roebuck and other large mail order and chain store retailers; that each of the price differentials alluded to added as much as 12 cents to the cost of production of a battery, and that an increase in cost of 5 to 10 cents per battery might, and did, during a substantial period of time involved herein, represent the difference between a profitable operation and a losing one on some types of batteries. The most favorable light which the record affords to petitioners is that the evidence as to the fact of competition and the effect of these differentials thereon is

conflicting. Consequently, as that conflict has been resolved adversely to petitioners by the triers of fact, we may not substitute our judgment on this phase of the case.

We observe briefly the argument, which applies to all pigments involved, that the price differentials were such an insignificant factor that no threat of adverse effect on competition can be spelled out. For example, the added unit costs of up to 8 cents per gallon of mixed paint and of up to approximately 12 cents per storage battery are singled out. We believe, however, that this raises a question peculiarly within the competence of the Commission, and that its determination thereon, as an expert administrative body, should be accorded full respect. The Commission was conceived and created by Congress as an agency especially informed and equipped to act to sustain the vigor of the economic pulse. Perhaps in no other field is the economic pulse, as envisaged in § 2 (a), so critically reflected as it is in the close relationship between added unit cost differences brought about by discriminatory pricing of raw components entering into the unit and the effect of such cost on competition within an affected industry. The courts are extremely reluctant to set aside the Commission's finding that a discriminatory price, though small, adversely affects the health of competition. See *FTC* v. *Cement Institute*, 333 U. S. 683, 726. It is noteworthy also, with respect to the § 2 (a) determinations, that Commissioner Mason, who filed a vigorous dissent against other portions of the Commission's order, concurred fully in the parts pertaining to price discrimination.

IV. Incipient Monopoly.

The complaint charged, and the Commission found, that National had, beginning in 1891, engaged in acts tending toward substantial control of and a monopoly in the pigment industry in violation of Section 5 of the Trade Commission Act. Accordingly, it ordered the company to cease and desist from acquiring or attempting to acquire any ownership of the capital stock, or properties of any of its competitors in the lead pigments field.

In this respect, National asserts that the Commission has no power under Section 5 to enjoin acquisitions of stock or assets which do not constitute a violation of Section 7 of the Clayton Act, 15 U. S. C. § 18. Irrespective of the Commission's power under § 5, we think the order so wanting in evidentiary support and so arbitrary that it cannot stand in any event. Therefore, we do not consider the § 5 question.

The Commission found that National was incorporated in 1891, effecting a merger of some 16 companies engaged in pigment production, and that between that date and the mid 1930's it acquired the properties of more than 30 other producers. From 1931 to about 1935, National made several attempts to acquire the facilities of Eagle-Picher, its largest competitor. Thus, beginning in 1931, National purchased substantial holdings of Eagle-Picher stock, though it never attained a position even remotely approaching majority control. The larger part of this stock was sold in 1937. Approximately 3,500 shares were retained, but these were sold in 1944. In-

cidentally, whether this represented merely an investment, as National insists, the record discloses that it grossed more than $800,000 in profits on the Picher stock transactions.

In addition to these findings relating to petitioner's history, the Commission relied on evidence relative to certain contracts, to which National was party, to support its ultimate conclusion of incipient monopoly. Three of these were executed on February 26, 1906. By the first, between National and AS&R, the former agreed to buy from the latter all its requirements of corroding lead, except an amount not to exceed 30,000 tons annually produced by Saint Louis Smelting Company, a wholly owned subsidiary of National, and 85% of its requirements of other types of pig lead, but not to exceed 85% of AS&R's production. Prices to be paid by National were pegged to AS&R's daily price quotations. It was agreed, further, that the excess of Saint Louis's production over 30,000 tons per annum would be sold to AS&R at a price substantially below the latter's daily quotation. The contract expired in 1921 and was not renewed. Under the second contract, National acquired all of the capital stock and securities of the United Lead Company, a holding company for all the securities of 13 producers of lead pigments. United was controlled at that time by a syndicate composed largely of AS&R's officers and directors, and AS&R had a substantial interest in United by virtue of stock ownership. By the third agreement, between AS&R and Hoyt Metal Company, a constituent company of National,

Hoyt agreed to buy and AS&R to sell the latter's entire production of antimonal lead. The Commission referred to a fourth document which, perhaps, should be mentioned in passing. In 1924 and in 1938, National agreed to supply du Pont's white lead-in-oil requirements on a processing fee basis. Under the terms of this contract du Pont furnished all raw materials and National manufactured therefrom and shipped the finished product at the former's direction on the payment of an agreed processing fee.

The ultimate finding of incipient monopoly is based on these findings as to transactions in the growth of petitioner to a dominant position in its field. We find the assertion that occurrences concluded more than twenty years before the order was entered can justify a perpetual injunction against any future acquisition of stock or physical assets of National's competitors a startling one. The Commission stated that it had not considered the question of possible antitrust violations in petitioner's growth from 1891 to the middle 1930's. Nevertheless, it relied on findings which can have no purpose save possibly to prove that a monopoly already exists to support its order which is geared solely to prevention of monopolistic practices at some undisclosed future date. Thus, the order is not supported by the findings and must fall under the principles announced in the *Universal Camera* case. *Universal Camera Corp.* v. *NLRB*, 340 U. S. 474.

We are not here concerned with judicial pronouncements that the Commission has authority

to determine the scope necessary in a cease and desist order to prevent violations of the Act. See *e. g., May Stores Co.* v. *NLRB,* 326 U. S. 376, 390–392. That principle assumes a present violation of the Act, in which case the Commission is given wide latitude in framing its order to compel compliance with the Act.

But such is not the case before us. The Commission has concluded from its findings of past activities, which may have had monopolistic overtones long ago, that petitioner presently harbors a desire to swallow up all competition and that, at some undisclosed time in the future, it intends to do so. Presumably the evidence of this intent is too delicate to stand the light of day, since it cannot be found in the record. Drafted on this basis, the order before us seeks to spank the child, not for naughty acts done or threatened, but on the general principle that he, may somewhere, somehow, in the future engage in mischief. This presumes the existence of a power even broader than that residing in a court of equity. The language of the Court of Appeals for the Fourth Circuit in the *New Standard* case is pertinent:

> When an order of the Commission is before us for review, the statute provides that to the extent that we do not modify it, we shall use our injunctive power to enforce it, 15 U. S. C. A. § 45 (c); and it is elementary that a court of equity will not enjoin one from doing what he is not attempting and does not intend to do. * * * While an administrative agency is not a court of equity, its orders must be based on evidence giving them reasonable support, and such support is not given for an

order relating to present and future practices by evidence relating only to transactions which occurred a decade before it was entered. * * * No one would contend that a cease and desist order should be upheld, if all the evidence supporting it related to business practices which occurred ten years before the filing of the proceeding. * * *" *New Standard Pub. Co.* v. *FTC*, 194 F. 2d 181, 183.

V. Validity and Scope of Order

The remaining questions relate to the validity of the order as against International and to its scope as applied to petitioners generally. These questions are hereinafter considered in the order in which they are stated.

A. Validity as to International.

International asserts that the record shows conclusively that it ceased production of lead pigments in 1946; that, therefore, any issue as to its alleged violations has become moot and that the Commission abused its discretion in entering a cease and desist order against it.

The facts pertaining to this question are not in dispute. The original complaint was filed in 1944, and the amended complaint in April 1946. On both dates, and for about 10 years prior to 1946, International was engaged in the production and sale of white lead, both dry and in-oil, at East Chicago, Indiana. In July 1946 it ceased production and, during the following month, the sale and distribution of the product was discontinued, and the trade given notice of the cessation. At no time since then, has petitioner engaged in any

phase of pigment production or marketing. In October 1946 it sold its plant and facilities to Eagle-Picher.

On completion of the evidence offered in support of the complaint, this petitioner moved to dismiss the complaint against it on the ground that it had permanently abandoned its pigment activities. Petitioner relied on the facts related above and the supporting affidavit of its vice-president stating that petitioner had sold its plant and facilities; that, with one or two exceptions, all qualified pigments technicians and sales personnel had left its employ, and that the company had no intention "ever to re-enter" the field.

The Commission denied the motion in March 1947, on the ground that "it is not unlikely that respondent may in the future see fit to re-enter" the field. However, upon the evidence submitted, the trial examiner later found that "There is no reason to believe that International will ever reenter the business of the manufacture and sale of lead pigments." Despite this finding, the Commission's order, issued in 1953, runs against International as well as the other petitioners and Glidden.

In *Marlene's, Inc.* v. *FTC*, 216 F. 2d 556, we had occasion to consider a similar situation. What we there said in reviewing decisions relative to the discretion lodged in the Commission to enter orders against discontinued practices is pertinent here; it need not be repeated. Id. at 559, and cases there cited. While the Commission is vested with a broad discretion to determine whether an order is needed to prevent the resumption of unlawful acts which have been discon-

tinued, this "discretion must be confined * * * within the bounds of reasonableness." Id. at 559.

This rule of reasonableness requires something more than a mere guess or suspicion contrary to the evidence and to the finding of the trial examiner that a resumption of discontinued practices may not reasonably be anticipated. As we have stated in our discussion of the monopoly question, the Commission is not empowered to "enjoin one from doing what he is not attempting and does not intend to do." *New Standard Pub. Co.* v. *FTC, supra* at 183; *FTC* v. *Civil Service Training Bureau,* 79 F. 2d 113 (CA–6).

The distinction on the facts between this cause and such cases as *Marlene's, Inc.* v. *FTC, supra,* and *Galter* v. *FTC,* 186 F. 2d 810, cert. denied 342 U. S. 818 (CA–7), is readily apparent. In each of those cases it appears that the petitioning party was still engaged in the same business in which the unlawful practices had been employed, and there was evidence from which the Commission might properly infer a public need for an order despite the fact that the specific unlawful practices had in fact been discontinued. Such a situation presents quite a contrast to the undisputed fact here that petitioner is no longer engaged in the industry in which the unlawful practice occurred and has divested itself of production properties.

And it is immaterial that petitioner may still be engaged in the smelting and refining of pig lead. No charges were before the Commission relating to that commodity, and there is nothing in the record to support any reasonable anticipation that petitioner will ever employ that com-

modity in pigment production. The cease and desist order entered in the face of this showing is arbitrary and must be set aside.

B. Scope of Order.

There remains the question of whether the order is too broad, in that it purports to prohibit certain individual activity, *i. e.*, whether the Commission exceeded its authority in this respect. In pertinent part the order prohibits any conspiratorial agreement or other concerted action to do those things which, according to the Commission's findings, amount to statutory violations. It expressly excludes from its edict agreements between any petitioner and its subsidiaries or affiliates which relate solely to the business of such petitioner and do not have the purpose or effect of unlawfully restricting competition. Petitioners do not challenge the propriety of the form of these provisions, but make an attack on the next paragraph, which restricts individual activity as follows:

> It Is Further Ordered that each of the respondents, its officers, agents, representatives, and employees, in or in connection with the offering for sale, sale or distribution of lead pigments in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from quoting or selling lead pigments at prices calculated or determined in whole or in part pursuant to or in accordance with a zone delivered price system for the purpose or with the effect of systematically matching the delivered price quotations or the delivered prices of other sellers of lead pigments and thereby

preventing purchasers from finding any advantage in price in dealing with one or more sellers as against another.

This portion of the order is assailed on the grounds first, that it is improper, since the complaint did not charge, and the Commission did not find, that individual use of the zone delivered price method was an unfair method of competition and, second, that the Commission is authorized under Sec. 5 to prohibit unlawful acts only and, conversely, is without power to prohibit behavior which has not been found to be unlawful.

The Commission insists that the paragraph represents an allowable judgment in its choice of a remedy, as is best shown by the language of its opinion, that "Such a prohibition is necessary, not because it is unlawful in all circumstances for an individual seller, acting independently, to sell its product on a delivered prices basis in specified territories, but to make the order fully effective against the trade restraining conspiracy in which each of the respondents participated."

Reported judicial authorities and the elementary principles of statutory construction compel the conclusion that this paragraph is beyond the power of the Commission and must, therefore, be set aside. The grant of power in Sec. 5 of the Act is expressly restrictive. Under subsection (a) the Commission is empowered to prevent any person "from using unfair methods of competition * * * and unfair or deceptive acts or practices in commerce." Subsection (b) provides that, after a hearing and on a finding "that the method of competition or the act or practice is prohibited" by the Act, the Commission may is-

sue an order requiring the person adjudged guilty of such conduct to "cease and desist from using such method of competition or such act or practice." 15 U. S. C. § 45 (a), (b).

The Commission may exercise only such powers as are granted to it by statute, *Arrow-Hart & Hegeman Co.* v. *FTC*, 291 U. S. 587, 598, and its remedy against practices must comport precisely with the legislative grant of power. The section is specific; the permissible order is restricted to a prohibition of "unfair methods of competition" found to exist. In the *Arrow-Hart* case, *supra*, the Court said, at page 598:

> The Commission is an administrative body possessing only such powers as are granted by statute. It may make only such orders as the Act authorizes; may order a practice to be discontinued and shares held in violation of the Act to be disposed of; but, that accomplished, has not the additional powers of a court of equity to grant other and further relief by ordering property of a different sort to be conveyed or distributed, on the theory that this is necessary to render effective the prescribed statutory remedy.

To the same effect see *FTC* v. *Eastman Kodak Co.*, 274 U. S. 619, 623–624; *FTC* v. *Sinclair Refining Co.*, 261 U. S. 463, 475, 476. While it is true that violations of the Clayton Act were charged in each of these cases, the same principle controls the scope of the permissible remedy under Sec. 5 of the Trade Commission Act. Compare the grant of power under the Clayton

Act, 15 U. S. C. § 21 with that under Sec. 5 of the Trade Commission Act, 15 U. S. C. § 45 (a), (b).

To support its reasoning that it may prohibit lawful actions where such a course is deemed necessary effectively to restrain an unlawful practice, the Commission relies on certain language in the opinion in *Jacob Siegel Co.* v. *FTC*, 327 U. S. 608, 611–613, as follows:

> The Commission has wide discretion in its choice of a remedy deemed adequate to cope with the unlawful practices in this area of trade and commerce. Here, as in the case of orders of other administrative agencies under comparable statutes judicial review is limited. It extends no further than to ascertain whether the Commission made an allowable judgment in its choice of the remedy. * * * The Commission is the expert body to determine what remedy is necessary to eliminate the unfair or deceptive trade practices which have been disclosed. * * * [A]nd the courts will not interfere except where the remedy selected has no reasonable relation to the unlawful practices found to exist.

The quoted language must be read in context, in the light of the facts there involved. The Commission had determined that Siegel's trade name "Alpacuna" as applied to coats was misleading and had prohibited further use of the term. The Court of Appeals affirmed. *Jacob Siegel Co.* v. *FTC*, 150 F. 2d 751 (CA–3). On certiorari, the finding that use of the trade name was misleading and thus illegal was not attacked; the only question before the Supreme Court was whether the Commission properly ordered excision thereof.

The Court reversed and remanded, on its determination that the Commission had not considered whether, by employing some qualifying language in connection therewith, use of the trade name might be preserved. The quoted language appears in the general discussion of the propriety of the excision order, and, when read in that context, does not, we believe, sanction a prohibition against lawful acts.

We have found no decision sanctioning an order such as this. True, the Commission is not restricted in its choice of a remedy "to prohibiting the illegal practice in the precise form in which it is found to have existed in the past." *FTC* v. *Ruberoid Co.*, 343 U. S. 470, 473. It may frame its order broadly to reach all phases of existing unlawful conduct. Thus, in Ruberoid, the Commission prohibited the use of all price differentials on its findings that differentials employed by that Company of 5% and greater were discriminatory in violation of § 2 of the Clayton Act, as amended. The Court held that the Commission was not required to restrict its order to the specific differential previously used, namely 5% and greater, in the absence of a showing by Ruberoid that differentials of less than 5% might be lawfully employed.

The same principle was applied in *Hershey Chocolate Corp.* v. *FTC*, 121 F. 2d 968 (CA–3). On a complaint charging unfair methods of competition in the sale of one candy item, the Commission had found that similar unlawful practices were being employed in the sale of several other confectionery items as well. The Court sustained an order which prohibited all such unlawful prac-

tices which the Commission had found to exist, on the theory that the entire unlawful conduct was related to the specific unlawful practice of which complaint was made.

Other cases cited by the Commission fail to support its contention. In *Dorfman* v. *FTC*, 144 F. 2d 737 (CA–8), no question was raised but that the practice prohibited by the challenged portion of the order was unlawful. The determination in *California Lumbermen's Council* v. *FTC*, 115 F. 2d 178, 185, cert. denied 312 U. S. 709 (CA–9), was that the practices which the Council insisted were lawful were, in fact, an unlawful restraint of competition, under the holding in *Eastern States Lumber Ass'n* v. *United States*, 234 U. S. 600, 612. And, finally, *FTC* v. *Wallace*, 75 F. 2d 733 (CA–8), must be read in the light of the unique situation there involved. That was a proceeding brought to enforce an order. The objectionable conduct existing prior to the proceeding in which the order was entered had been accomplished through the offices of an association, composed of all individual respondents, but, as the Commission found, wholly controlled by Wallace. After a cease and desist order was entered, the association was dissolved, but Wallace continued the same practices unabated in behalf of himself and the other ex-members of the association. The Commission filed a petition against Wallace only, for enforcement of its order. His answer did not deny the averments made; he demurred on the ground, *inter alia*, that the order restrained concerted conduct and, therefore, enforcement could not be decreed against him alone, to restrain his individual conduct. He did not deny

that his own conduct was illegal, but argued merely that it did not come within the purview of the order. The court entered a somewhat unique decree, first modifying the Commission's order to prohibit individual as well as concerted use of the admittedly unfair practice, and then enforcing the order as thus modified, against Wallace alone.

In each of the cases upon which the Commission relies, the courts have sustained restraints only against conduct found to be unlawful, resolving all doubts in favor of the Commission's order in those gray areas wherein the legality or illegality of a particular course of conduct depends on the circumstances surrounding its use. Cf. *FTC* v. *Ruberoid Co.*, 343 U. S. 470, 473. The individual practices against which this order runs are not shrouded in fog. On the contrary, the Commission expressly pointed out that it had not considered the individual use of the zone system, but concluded that the portion of the order with reference thereto was necessary in order to prevent evasion. This position presents a striking contrast to the language of the Supreme Court in *FTC* v. *Cement Institute*, 333 U. S. 683, 727–728, wherein the Court, in affirming an order prohibiting conspiratorial use of a basing point system, carefully pointed out that it did not affect individual use of such system. Although no question of individual restraint was presented, the Court's meticulousness, in emphasizing the limitations of the order before it, is important as indicative of the esteem which it attached to preservation of the individual's right to adopt and employ his own business practices, notwithstanding the fact

that concerted action between competitors to employ the same practices may violate the Act.

The part of the order with which we are now concerned does not differ in any significant respect from the one we struck down in *Salt Producer's Ass'n* v. *FTC*, 134 F. 2d 354. There, as here, we sustained the Commission's findings that the petitioners, acting in concert, had employed a uniform zone delivered pricing basis in the sale of salt. There, as here we sustained the determination that such concerted activity was violative of the Act and the order prohibiting its prospective use. There, as here, the complaint contained no allegations with respect to the individual use of the zone system. Petitioners were ordered to cease and desist from employing "*any common cause of action* * * * establishing or maintaining delivered price zones, or making quotations and sales of salt upon a delivered price basis under a zone system whereby the cost of salt * * * is made identical at all destinations within such zone." We set the order aside saying, 134 F. 2d at page 358:

> The complaint discloses the Commission's aim to eradicate and prohibit all *concert* of action by these petitioners, looking to the establishment and fixation of prices. There was no indication in the complaint that they were assailing the zone system *per se* as an unfair method of competition by one manufacturer in relation to two purchasers of his salt, in the same zone, where the freight costs are averaged, and one bears a greater burden than the actual freight cost incurred.

> If the zone system *per se* is to be condemned, there ought to be a hearing by the Commission and a finding on the precise issue of the unfairness of such a commercial practice.

Although the Salt Producers order is not identical with that before us, we think the two cannot be distinguished in principle. The Commission asserts that the present order does not restrain all individual use of the zone system but only that which has the effect of "systematically matching the prices" of a competitor at a particular designation. The fact remains, however, that there have been no complaint, no hearing and no findings relative to the effect of such parallel individual actions. *Salt Producers' Ass'n.* v. *FTC, supra.* Cf. *FTC* v. *Gratz,* 253 U. S. 421, 424.

Clearly, the Commission was concerned here with enforcement of its order prohibiting concerted action. In justifying the paragraph in question, it pointed up "the likelihood" that petitioners might continue to use the same zone systems and plead that they have abandoned the unlawful agreement and that such use is merely individual parallel conduct. It seems to us that this is an unwarranted anticipation of a situation which may never arise and an attempt to decide, by an anticipatory order, questions which will be a subject for this court to consider should some future enforcement proceeding become necessary. We refuse to sustain such a sweeping inroad on individual liberty of competitive action, without a prior determination by the Commission, after an

appropriate hearing, that such activity is a violation of the Act. Lawful acts do not become automatically unlawful because of an administrative guess that a declaration of their illegality may facilitate enforcement of a valid order.

If individual use of the zone system by petitioners is to be restrained, that result must be achieved by a proper order in a proceeding conducted in conformity with the statute, in which the invalidity of such conduct is determined. The Commission's power to act is conditioned on such a determination. *Salt producer's Assn.* v. *FTC supra;* Cf. *Arrow-Hart & Hegeman Co.* v. *FTC*, 291 U. S. 587; *FTC* v. *Eastman Kodak Co.*, 274 U. S. 619, 623–624; *FTC* v. *Western Meat Co.*, 272 U. S. 554; *FTC* v. *Sinclair Refining Co.*, 261 U. S. 463, 475–476.

The order, as modified by this opinion, will be affirmed. The Commission shall, within 20 days, submit a proposed decree modifying its present order in accord with the views expressed herein and submit the same to petitioners and to this court. Within 10 days thereafter, petitioners shall consent or file objections thereto. The final decree will then be entered.

APPENDIX B

Judgment of the United States Court of Appeals for the Seventh Circuit

The National Lead Company, The Sherwin-Williams Company, The Eagle-Picher Company, The Eagle-Picher Sales Company, Anaconda Copper Mining Company and the International Smelting & Refining Company having filed in this Court petitions to review and set aside an order to cease and desist issued on January 12, 1953, by the Federal Trade Commission in a proceeding before the said Commission entitled "In the Matter of National Lead Company, et al., Federal Trade Commission Docket No. 5253;" and the petitions having been heard by this Court on briefs and oral argument; and the Court having on December 1, 1955, filed its opinion providing for modification of said order of the Commission and for affirmance of said order as modified as to all petitioners except Anaconda Copper Mining Company and International Smelting & Refining Company:

Now therefore it is hereby ordered, adjudged and decreed that with respect to petitioners Anaconda Copper Mining Company and International Smelting & Refining Company the aforesaid order to cease and desist be, and it hereby is, set aside.

It is hereby further ordered, adjudged and decreed that with respect to petitioners National Lead Company, The Sherwin-Williams Company,

The Eagle-Picher Company and The Eagle-Picher Sales Company, the following paragraphs of the aforesaid order to cease and desist be, and they hereby are, set aside:

> It is further ordered that each of the respondents, its officers, agents, representatives, and employees, in or in connection with the offering for sale, sale or distribution of lead pigments in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from quoting or selling lead pigments at prices calculated or determined in whole or in part pursuant to or in accordance with a zone delivered price system for the purpose or with the effect of systematically matching the delivered price quotations or the delivered prices of other sellers of lead pigments and thereby preventing purchasers from finding any advantage in price in dealing with one or more sellers as against another.
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> * * * * * *
>
> It is further ordered that the respondent, National Lead Company, its officers, agents, representatives and employees do forthwith cease and desist from acquiring or attempting to acquire, directly or indirec ly, any interest or ownership or control in the capital stock, or in the physical assets, plants, or other properties, of any concern or enterprise which at the time of such acquisition or attempted acquisition is a competitor of said National Lead Company in the manufacture or in the sale or distribution of lead pigments.

It is hereby further ordered, adjudged and decreed that with respect to petitioners National Lead Company, The Sherwin-Williams Company,

The Eagle-Picher Company and The Eagle-Picher Sales Company, the aforesaid order to cease and desist be, and the same hereby is, modified to read as follows:

Pursuant to Section 5 of the Federal Trade Commission Act:

It is ordered that the respondents, National Lead Company, The Eagle-Picher Company, The Eagle-Picher Sales Company, The Sherwin-Williams Company, and the Glidden Company, their respective officers, agents, representatives and employees, in or in connection with the offering for sale, sale or distribution of lead pigments in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from entering into, continuing, cooperating in, or carrying out any planned common course of action, understanding, agreement, combination, or conspiracy between or among any two or more of said respondents, or between any one or more of said respondents and others not parties hereto, to do or perform any of the following things:

1. Establish, fix, or maintain prices, terms, or conditions of sale for lead pigments, or adhere to any prices, terms, or conditions of sale so fixed or maintained.

2. Quote or sell lead pigments at prices calculated or determined in whole or in part pursuant to or in accordance with a zone delivered price system; or quote or sell lead pigments pursuant to or ~~in~~ accordance with any other plan or system which results in identical price quotations or prices for lead pigments at points of quotation or sale or to particular purchasers by any two or more sellers of lead

pigments using such plan or system, or which prevents purchasers from finding any advantage in price in dealing with one or more as against another seller.

3. Quote or sell lead pigments at specified differentials over any particular quotation or quotations of pig lead prices.

4. Quote or sell lead pigments at specific price differentials based upon differing sizes or types of containers or based upon differing quantities in which such products are sold or delivered.

5. Enter into, employ, or continue in effect, any agency or consignment contract, plan or arrangement under which the resale prices or selling practices of any dealer or distributor are controlled or directed.

6. Issue to dealers suggested resale prices, dealers' price schedules, or list prices for the purpose or with the effect of inducing dealers to observe uniform resale prices and refrain from price competition among themselves.

It is further ordered that nothing contained herein shall be construed as prohibiting the establishment or maintenance of bona fide agreements, understandings or other relations between any of the respondents and its officers, directors and employees, or between any of the respondents and any of its subsidiaries or affiliates, relating to the sole and separate business of said respondent and its subsidiaries or affiliates, when not for the purpose or with the effect of unlawfully restricting competition.

Pursuant to Section 2 of the Clayton Act, as amended:

It is further ordered that each of said respondents, its officers, agents, representatives, and employees, directly or through any corporate or other device, in connection with the sale of lead pigments in commerce, as "commerce" is defined in the aforesaid Clayton Act, do forthwith cease and desist from discrimination, directly or indirectly, in the price of lead pigments of like grade and quality:

1. By selling such lead pigments, except dry white lead when not sold as a key product, at different zone delivered prices to purchasers located in different territorial zones when such purchasers are in competition with one another in the resale or distribution of said products, either as lead pigments or as components of other products.

2. By selling such lead pigments to purchasers competing in the resale or distribution thereof, either as lead pigments or as components of other products, at different prices which vary according to the quantities in which said products are to such purchasers sold or delivered, except at such differentials as were not shown in this proceeding to have resulted in adverse competitive effects or as were shown to have been justified on the basis of differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which the products were sold or delivered, as stated in the findings as to the facts and conclusion herein.

It is hereby further ordered, adjudged and decreed that as so modified the foregoing portion of said order entered pursuant to Section 5 of the

Federal Trade Commission Act be, and the same hereby is, affirmed as to said petitioners, and said petitioners are commanded to obey the same and comply therewith.

It is hereby further ordered, adjudged and decreed that as so modified the foregoing portion of said order entered pursuant to Section 2 of the Clayton Act, as amended, be, and the same hereby is, affirmed as to said petitioners.

It is further ordered, adjudged and decreed that petitioners National Lead Company, The Sherwin-Williams Company, The Eagle-Picher Lead Company and The Eagle-Picher Sales Company shall, within ninety days after service upon them of this decree, file with the Federal Trade Commission a report in writing setting forth in detail the manner and form in which they have complied with its said order as herein modified.

Without prejudice to the right of the Federal Trade Commission, the respondent herein, to institute and maintain such proceedings for violation of this decree as may be warranted by law, this Court retains jurisdiction of this cause to enter such further orders or decrees herein from time to time as may become necessary.

By the Court:

(S) WALTER C. LINDLEY,
(S) H. NATHAN SWAIM,
(S) ELMER J. SCHNACKENBERG,
United States Circuit Judges.

Entered: JANUARY 5, 1956.

APPENDIX C

SUPREME COURT OF THE UNITED STATES

October Term 1955

No. —

FEDERAL TRADE COMMISSION, PETITIONER
v.
NATIONAL LEAD COMPANY, THE SHERWIN-WILLIAMS COMPANY, THE EAGLE-PICHER COMPANY AND ANACONDA COPPER MINING COMPANY

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

Upon consideration of the application of counsel for petitioner,

It is ordered that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including April 19th, 1956.

(S) SHERMAN MINTON,
Associate Justice of the Supreme Court of the United States.

Dated this 30th day of March, 1956.

U. S. GOVERNMENT PRINTING OFFICE: 1956